BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of Mary Ellen Underwood, Administratrix of the Estate of Emmett G. Underwood, Deceased, v. Louisville and Nashville Railroad Company, which petitioner herein seeks to have reviewed, appears on pages 206 to 209 of the transcript of the printed record filed herewith.

STATEMENT OF FACTS.

The essential facts in the case are fully stated in the petition, and for brevity are not repeated here. In the argument reference will be made to them on the points involved.

SPECIFICATIONS OF ERROR URGED.

It is submitted that the Circuit Court of Appeals, in its opinion in said cause, erred:

1. In finding that the negligence of Underwood in throwing the wrong switch was not the proximate cause of the accident and resulting injuries to him.

2. In finding that the engineer and fireman were negligent in moving the cut while the signals of Underwood were lost to view.

3. In not finding that the respondent had not adduced any evidence sufficient to warrant submission of the cause to the jury upon any of the charges of negligence upon which it was submitted.

SUMMARY OF ARGUMENT.

1. The negligence complained of must be shown affirmatively by the plaintiff to be the cause of the injury, must be more than a mere scintilla, of appreciable and reasonable substance, cannot rest in conjecture or speculation, and unless there is evidence from which the inferences may reasonably be drawn that the injuries suffered were caused by the negligent act of the employer, the case must be withdrawn from the consideration of the jury and judgment entered in favor of the defendant.

Patton v. Texas & Pacific Co., 179 U. S. 658, 21 S. Ct. 275;
Gulf etc. Ry. Co. v. Wills, 275 U. S. 455, 48 S. Ct. 151;
Atchison, Topeka & Santa Fe Railway v. Toops, 281 U. S. 351, 50 S. Ct. 281;
New Orleans & Northwestern Rwy. Co. v. Harris, 247 U. S. 267, 38 S. Ct. 535;
N. Y. C. Rwy. Co. v. Ambrose, 280 U. S. 486, 50 S. Ct. 198;
C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 216;
Seaboard Air Line v. Horton, 233 U. S. 492, 502, 34 S. Ct. 635.

2. Where one has the primary duty of controlling certain acts and is negligent therein he cannot recover although he might show that the others who had no duty in regard to said acts might, by doing something outside their line of duty, have prevented him from causing injury to himself.

Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33;
Frese v. C. B. & Q. R. Co., 263 U. S. 1, 3, 33 S. Ct. 1;
Southern v. Youngblood, 286 U. S. 313, 52 S. Ct. 518;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91;

Great Northern v. Niles, 240 U. S. 444, 36 S. Ct. 406;
A. C. L. v. Davis, 279 U. S. 34, 49 S. Ct. 210;
Southern v. Gray, 241 U. S. 333, 36 S. Ct. 558.

3. Because of the fact that the accident in question preceded the amendment of the Federal Employers' Liability Act, removing the defense of assumed risk, respondent's intestate assumed the risks incident to his employment and such extraordinary risks of which he was informed.

Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. Ct. 635;
Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 38 S. Ct. 139;
Tuttle v. Milwaukee Ry., 122 U. S. 189.

4. That the negligence of the decedent Underwood was the proximate cause of the accident which resulted in his receiving his fatal injuries, and that no evidence was adduced by respondent on the question of petitioner's negligence which warranted submission of the cause to the jury.

ARGUMENT.

That respondent's intestate threw the wrong switch is not in any place in the record or in any manner denied by respondent. Although strange in the yard, his movements were explained to him twice by members of the crew, who elaborated on their explanations to the extent of drawing sketches of the switches and tracks involved, and to whom he stated that he did understand the situation (R. 87, 173, 174). To a layman, the arrangement of the switches and tracks might seem puzzling, but to a railroad man they do not present any unusual situation. Moreover, should it have seemed strange and puzzling to him in the dark night, such is of no avail, for those facts should all the more have stopped him from proceeding on the switch lining if he was not sure which switch to throw. However, he did not throw the switches in the dark. He threw them in the full light of the engine's headlight, which was burning brightly. Moreover, this accident happened before the Federal Employers' Liability Act was amended, cutting off another defense, that of assumed risk. Throwing switches is part of the work of switchmen or brakemen. The hazards connected to and the dangers following the throwing of the wrong switch are such risks as come under the term "assumed risk." Therefore, we start to examine the actions of the other members of the crew with the inescapable and foundation fact that the plaintiff himself was negligent by throwing the wrong switch. Although contributory negligence is no defense under the Act, yet if petitioner was not itself guilty of any negligence, respondent is not entitled to a submission of the cause to a jury, nor if the contributory negligence was the sole cause of the accident. As this Court said in Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 216, "the plaintiff cannot recover in the absence of negligence on the part of defendant."

Respondent claims that the engineer did, or by the exercise of reasonable care could have ascertained the fact that Underwood had thrown the wrong switch. In this connection respondent claims that the curvature of the cut of cars onto pocket track 1 should have been seen by the engineer, inasmuch as house track 1 had no such curvature. The engineer, however, testified that it was dark in the yards, and although he was looking south along the cut, he did not and could not have seen the cut curving. There was no light on the platform nor any place south of the cut that would create a shadow or otherwise tell him where the cut was moving. Without any more testimony than that on said charge of negligence it was permitting the jury, by submitting the issue to them, to speculate and conjecture whether or not the engineer did, or in the exercise of reasonable care should have observed that Underwood threw the wrong switch. The engineer knew that the cut should move onto house track 1, and certainly would not under any circumstances have permitted the cut to move into the wrong track, which would only have required him to do unnecessary work in taking the cut back again and onto the right track. Acting so as to cause themselves unnecessary labor is not the way employees knowingly work. Even respondent's own witness, a former engineer, testified that he could not say that at night he could see the right track (R. 108). The relative positions of the lead to the pocket tracks to an engineer on house track 1 a few feet south of switch 3, which controls said pocket tracks, is the same as the wagon track to an engineer on house track 1 a few feet south of the switch controlling movements into the wagon track. Both lead off at an angle on the same side of house track 1.

The same is true as to the fireman. He states that he did not see, nor could he see, that the cut was moving onto the wrong track, and to him the tracks would appear approximately the same, whether he stood between house

track 1 and the pocket track, or house track 1 and the wagon track. He further stated that he had no further duty in connection with the movement until it had stopped. There is not any evidence in this record to show that either the fireman or the engineer could have discovered the facts which respondent alleges they negligently failed to do. There being no evidence thereon, the charge must fail. Southern Railway Co. v. Gray, 241 U. S. 333, 36 S. Ct. 558. It is a well-settled rule of this court that where one has the primary duty of controlling a movement, and is negligent therein, he cannot blame some one else who had no duty in regard to the movement for not doing something outside of that person's line of duty, although by so doing that other person could have prevented the injured party from causing injury to himself.

By what rule of law do those alleged failures on the part of the engineer and fireman make the petitioner liable? Was not Underwood primarily responsible to put the cut of cars onto the right track? Was it not his duty to throw the (right) switch? Was it not his duty to give the initial signal for the backing up of the train onto the (right) track? He had the physical control of the cut of cars as to selecting the switch to throw and to command the cars to back up. It seems to us that this case falls squarely into the language of this Court used in the case of Davis v. Kennedy, 266 U. S. 147, 148, 45 S. Ct. 33, wherein it said:

> "It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

In that case it was claimed that it was the duty as well of the other members of the crew as of the engineer, for

whose heirs the suit was brought, to look out for the proximity of a certain train. This the engineer did not do and was killed. Generally, it was the intention of the entire crew to spot the car on house track No. 1. But the primary duty of throwing the right switch and of shouldering the responsibility of throwing the wrong switch was directly that of Underwood. Furthermore, was not Underwood in a much better position to see or know that the cars were going onto the wrong track? He was at the time of the curving of the last car, presumably, riding on it. He was in the best position, and under the evidence in this record the only position, to ascertain that fact. He was in the best position, and under the evidence in this record in the only position, to ascertain the fact that the uncovered platform was on his right hand instead of his left.

Again, this Court in the case of Frese v. Chicago, B. & Q. Ry. Co., 263 U. S. 1, 3, 44 S. Ct. 1, 2, said that to hold that as law the plaintiff could recover for injury primarily due to his failure to act as required, because others had not done more, would be a perversion of the act.

Underwood had a positive duty to perform and everyone and everything else depended upon his faithful performance of that duty; and his failure to perform his duties, and nothing else, was the proximate cause of his injuries and unfortunate death.

Respondent also claims that the engineer was negligent because he allowed the movement to continue without being able to see or receive a signal from Underwood. Wherein has respondent shown that any signal ever came from Underwood? If no signal was given, and on this record such conclusion is inescapable, how can it be said that the engineer was negligent in moving without being able to see the signal? How could the jury pass on that issue in favor of respondent, without resorting to a guess, a surmise, conjecture or speculation? Without the neces-

sary preceding fact that a signal was given, the failure to receive it cannot under any sound and reasonable theory be negligence. We submit that no minds of reasonable and fair-minded persons could arrive at any other conclusion.

The last claim of negligence by respondent and most strongly relied on by her is that the engineer was negligent in not obeying operating rule 1011 of the petitioner, which reads as follows:

> "Rule 1011: They must take into consideration the fact that the lives of the passengers and employes as well as the property of the Company are entrusted to their care; and it is fully expected and required that they will not only attend to and obey all signals and instructions, but also that they will, on all occasions be vigilant and cautious themselves, not trusting alone to signals and rules for safety. If in switching the signals are lost to view, stop must be made until signals can be seen."

In this connection, let us consider some of the facts and circumstances surrounding the movement. From the pocket track switch (3) point to the end of the pocket is approximately 390 feet. From the pocket track switch point to the end of house track is more than 720 feet. That is, the southward movement of the cut was over a distance of 390 feet, whereas had it gone onto the right track it could have traveled more than again as far before it would be required to stop. Was there anything unusual in the fact that the cut moved for the distance it did move without a signal to stop having been given by Underwood? For had it gone onto the right track it would have had to move as far as it did before a signal would have been proper, and it could have moved more than twice as far as it did before a stop signal would have had to be given. With the division of the duties as Underwood and the

fireman made, the signal to stop would have been given by Underwood from the top of the car. While the cut was moving southwardly Underwood was going to the place from where he was to give the stop signal. He was not hurt while going there. Therefore, the not stopping of the cut while Underwood's lantern was lost to view could not have caused the accident. The accident was caused by Underwood not giving a stop signal when he did get to the place from where he was to give the stop signal.

But, will say respondent, that Underwood was trying to give a signal to stop with an extinguished lantern? Where is the proof that he was so doing? It is only a guess, a speculation, a surmise and a conjecture that he was. Yet that is what the jury was permitted to do. The cases are endless in number, that if the evidence leaves the matter in the realm of speculation and conjecture, it is error to submit the cause to the jury.

The record is completely silent as to what Underwood was doing while the cut was being backed. The time involved, approximately 400 feet at three to five miles per hour, would have been more than sufficient for Underwood to have gotten off the cut before it reached the halfway mark, and when the engine came up to him to have notified the engineer that he (Underwood) had thrown the wrong switch. Or what was to prevent Underwood from seeing that the platform was on the wrong side of the approaching cut and to have walked back not much more than forty feet while the cut was, at walking speed, moving not less than 100 feet, and placed himself upon the second car where he would not have been hurt?

For all this record shows, Underwood could have placed the lantern on the front end (in the direction it was moving) of the car he was riding on and where, because of the perspective, it might not have been visible to the engineer,

and never gave a stop signal with it. Just as well as he could have stood on the last car with his lantern visible to the engineer without giving a stop signal until it was too late. Under that situation for the jury or a court to hold that it was negligence to proceed while the signal be lost to view would be drawn on a premise and conclusion not sustained by any logical process of reasoning, inasmuch as the foregoing comparison shows that observance of the rule would not have prevented the accident.

There is no proof in this record that any stop signal was given, or if respondent pleases, was attempted to be given. Without proof, to say such is the fact is only to pass into the imaginary world of make-believe. To make what respondent in effect claims to be the law would be to substitute reasoned, judicial opinions of reasonable and fair-minded persons for a competition of guesses, surmises, speculations and conjectures.

For the foregoing reasons which petitioner has humbly, earnestly and sincerely presented, petitioner prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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